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In The

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Americans with Disabilities Act permits an employer to deny a job to an individual with a disability who is able to perform all essential job tasks and who poses no threat to the health or safety of others, but who the employer believes will be harmed by the job at issue.

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Relevant provisions of the Americans with Disabilities Act are reproduced in an appendix to this brief.

STATEMENT

A. Chevron's Exclusion of Echazabal

This case involves Chevron's admittedly disability-based decision to exclude Mario Echazabal in early 1996 from employment at its El Segundo, California, refinery – a decision that was motivated solely by the fear that Echazabal himself would suffer harm on the job in the future. The issue first arose in 1992, when Echazabal applied for a job with Chevron in the coker unit of the El Segundo refinery. J.A. 117. When he filed that application, Echazabal had worked at the refinery since 1972 (with a three-year break from 1976 through 1978), albeit for various contractors retained by Chevron rather than for the company itself. J.A. 117. During that time – and "steadily for approximately 12 to 13 years" – Echazabal had worked primarily at the coker unit. J.A. 117.

When Echazabal applied to Chevron in 1992, the company extended him an offer of employment conditioned on the results of a physical examination. J.A. 118. Philip Baily, the company doctor who performed the examination, concluded that Echazabal had an uncorrectable liver abnormality and should not be exposed "to solvents or other liver toxic chemicals in order not to exacerbate [that] problem." J.A. 157. Baily reached that conclusion on the basis of blood tests that showed elevated levels of three specific enzymes that are released into the bloodstream when liver cells are damaged. J.A. 158. But Baily made no attempt to ascertain what specific

hepatotoxic substances were present in the refinery, at what levels, nor did he seek to determine whether those substances, at those levels, would be harmful to a person with Echazabal's condition. J.A. 159-160. He simply determined that Echazabal should not be exposed to *any* hepatotoxins or solvents, J.A. 157-160, and Echazabal was never hired, J.A. 197.

Although Chevron refused to place Echazabal on its payroll, it made no effort to remove Echazabal from his position working for Chevron's contractor in the coker unit. J.A. 118. Echazabal thus remained in the same position as before, exposed to the same substances to which he would have been exposed had Chevron hired him. J.A. 109, 118.[1] In the meantime, Echazabal sought medical treatment. J.A. 118. His blood tests continued to show high levels of enzymes released due to liver damage, and his doctors ultimately identified an infection with the Hepatitis C virus as the source of the problem. J.A. 124.[2]

In the fall of 1995, Chevron advertised openings for "plant helpers" in its El Segundo coker unit. J.A. 53-54. Echazabal applied for this job and Chevron again

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[1] In 1994, Echazabal transferred to a plantwide "fire watch" position for the same contractor. J.A. 117. In that position, Echazabal worked throughout the refinery, including in the coker unit. *Ibid.*

[2] In April 1993, after it had become clear that Echazabal's enzyme levels were persistently high, but before Hepatitis C had been identified as the source of the problem, one of Echazabal's doctors, Nga Ha, informed Chevron that Echazabal was now "capable of carrying on with the work that he has applied for and there is no restriction on his activity at work as outlined by the working condition sheet GO-308 that was sent to me." J.A. 123. Chevron took no action to hire Echazabal after this letter, however.

extended him an offer of employment conditioned on the results of a physical examination. J.A. 55-56. In early January 1996, Kenneth McGill (who had replaced Baily as the company doctor), performed the examination. J.A. 38. McGill was a self-described "generalist" with no board certification whatsoever, who was "doing industrial medicine just through self-training." J.A. 134; see also J.A. 36-37 (summarizing McGill's resume). He concluded that exposure to the hydrocarbons and other hepatotoxic substances at the refinery "could be fatal" to Echazabal – whether through a single, catastrophic exposure as might result from an explosion or fire, or on the basis of small exposures over time. J.A. 39-40.[3]

McGill reached this conclusion without knowing what specific chemicals were present, at what levels, in the coker unit environment. J.A. 131-132, 139. He did not consult the refinery's industrial hygiene department or anyone else to determine "what the actual exposures would be to somebody employed as a plant helper working at the coker." J.A. 132-133. Nor did he attempt to determine what level of hydrocarbon exposure would be safe for an individual with Echazabal's condition – despite the fact that hydrocarbons are ubiquitous in the environment. J.A. 108, 140-141. Nor, despite his lack of

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[3] As for the long-term risk based on small exposures, McGill could not predict when that risk might eventuate, if ever. See J.A. 141 (declining to identify any "specific period of time" in response to a question whether the risk would eventuate in "Three weeks? Three months? Three years? Three decades?"). The most McGill could say was his response when asked whether he thought Echazabal's "liver condition would change in any manner if he continued to work in the refinery for the rest of the year 1996": "Yes, I thought it could." J.A. 142.

training and experience in the area, did McGill contact a doctor knowledgeable in liver disease.[4] Based solely on McGill's recommendation, which McGill cleared with Chevron's medical director in San Francisco, J.A. 44, the human resources manager at the El Segundo refinery decided in early February 1996 to withdraw the conditional offer of employment. J.A. 32-33. The manager, William Saner, did not know what chemicals were present, in what concentrations, at the coker unit. J.A. 143-144, 148-152.

After Chevron rescinded the job offer, the company requested that Irwin Industries (the contractor for whom

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[4] McGill did contact Zelman Weingarten, the HMO physician then assigned to Echazabal – though McGill did so only *after* he had decided that Echazabal should not work in the refinery. J.A. 142-143. McGill informed Weingarten generally that Echazabal sought a position that "may entail exposure to hepatotoxic hydrocarbons." J.A. 97; see also J.A. 164 (McGill stating that, in telephone conversation with Weingarten, McGill "had verbally either read the paragraph in my letter or paraphrased it asking him to respond to our concern"). Weingarten responded, equally generally, in two sentences: "In your letter, it is mentioned that Mr. Echazabal has applied for return of his job and it [is] mentioned that 'this may entail exposure to hepatotoxic hydrocarbons.' This, of course, is recommended not to be the case." J.A. 98; see also J.A. 142 (stating that, in telephone conversation, Weingarten made "[t]he same statement that's in his letter"). But Weingarten did not state that exposure to the hydrocarbons at the refinery – the identity and concentrations of which he could not have known – would pose a significant risk to Echazabal's health. His statement is entirely consistent with a simple desire that, all other things being equal, his patient would generally take a conservative approach to avoiding unnecessary exposures to hydrocarbons. Because Chevron is the party that moved for summary judgment, this ambiguity must be resolved in Echazabal's favor.

Echazabal was then working) "immediately remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." J.A. 58. In response, Irwin sent Echazabal to be examined at the office of Dr. Brian Tang. J.A. 119-120. Tang determined on the basis of the elevated liver enzyme levels that Echazabal should not work in a position in which he would be exposed to any amount of any hepatotoxic substances. J.A. 80-82, 87, 89, 92-93. Like Chevron's doctors, Tang did not determine which precise hepatotoxins were present, in which concentrations, in the refinery, for he believed that even "trace amounts could blow out [Echazabal's] liver." J.A. 87. But he could not quantify the probability that Echazabal would experience such a harmful result, J.A. 86-88, or even put a general time frame on when it might occur. J.A. 83-84. Nonetheless, Irwin removed Echazabal from the refinery in late February 1996. J.A. 198.

B. What a Reasonable Inquiry Would Have Revealed

In early 1997, Echazabal filed this suit in state court. The complaint alleged, *inter alia*, that Chevron's 1996 decision to exclude Echazabal from the refinery violated the Americans with Disabilities Act (ADA). J.A. 15-16. Chevron removed the suit to federal court and soon moved for summary judgment. J.A. 1. On the ADA claim, Chevron's motion argued that the company was entitled to exclude Echazabal because his employment would pose a "direct threat" to his own health or safety. J.A. 184 & n.6.

In response, Echazabal presented declarations from two expert witnesses to describe what Chevron would

have learned had it examined information in its own possession regarding the hepatotoxins in its coker unit and conducted an inquiry into medical knowledge available at the time of its 1996 decision to exclude him from the refinery. J.A. 99-116. One of these experts, Marion Fedoruk, was a physician board certified in Occupational Medicine, Industrial Hygiene, and Toxicology who had taught at several medical and public health schools. J.A. 99-100. The other, Gary Gitnick, was chief of the Division of Digestive Diseases at the UCLA School of Medicine and a leading authority on liver disease who had been a member of an early research team that described the "non-A, non-B hepatitis later known as hepatitis C." J.A. 110-111. Fedoruk and Gitnick testified that Chevron could not reasonably have concluded that Echazabal would pose a risk to himself in the coker unit. J.A. 99-116.

Fedoruk and Gitnick made two major points. The first concerned Echazabal's liver function. Although Hepatitis C begins to cause damage to liver cells soon after infection, a chronic case like Echazabal's can take decades before it impairs liver *function*. J.A. 101, 112. The persistently high levels of enzymes in Echazabal's blood indicated that cells in Echazabal's liver were continuing to be injured – that is, that Echazabal had a *chronic* case of Hepatitis C. J.A. 102, 113-114. But those enzyme levels could not indicate whether his liver was *functioning* properly in eliminating toxins from the body. J.A. 102, 113-114. Rather, tests of blood albumin levels and prothrombin time (the time it takes blood to form clots) represent "the best and only true indicators of liver function." J.A. 113.[5]

[5] Relying on a web page that is not in the record, Chevron states that the NIH has "warn[ed]" against reliance on albumin levels and prothrombin time, because "those tests 'are normal until late-stage disease.' " Pet. Br. 9 n.5 (quoting National Digestive Diseases Information Clearinghouse, *Chronic Hepatitis C: Current Disease Management* (available at http://www.niddk.nih.gov/health/digest/pubs/chrnhepc/chrnhepc.htm)). But the NIH does not warn against using such tests to determine liver *function*; rather, it says that they should not be used to *diagnose* Hepatitis C. That is because liver function (including the ability to process toxins – the function of concern here) remains normal until late-stage disease. See National Digestive Diseases Information Clearinghouse, *supra*.

Those tests consistently showed "that Mr. Echazabal's liver is functioning properly." J.A. 113; see J.A. 101, 114. Gitnick thus concluded that "Mr. Echazabal's liver is as capable of detoxifying or metabolizing toxins that enter his body as is any other person['s]" and that "Mr. Echazabal is in no greater risk of injuring himself and specifically his l[i]ver by working in the refinery than other employee[s]." J.A. 115.

The second point concerned the level of hepatotoxins present in the refinery generally and the coker unit specifically. A number of substances at the refinery might be dangerous to Echazabal's (or any employee's) liver if present in high enough concentrations. See Pet. Br. 5-7. But Fedoruk concluded, based on Chevron's own records and information available at its refinery, that *none* of these substances were present in high enough concentrations to cause a significant risk to Echazabal or any other employee. J.A. 102-110. He also concluded that Echazabal faced no greater risk from catastrophic exposures such as fires and explosions than did any other employee. J.A. 109.

C. The District Court and Court of Appeals Opinions

The district court recognized that the Fedoruk and Gitnick declarations "rais[ed] a genuine issue that despite elevated liver enzyme levels, plaintiff's liver function was normal, and that the substances to which he would be exposed in the position of plant helper posed no greater a danger to Echazabal than to other workers." J.A. 186. But because those declarations were not prepared "until after the acts by Chevron and Irwin complained of by plaintiff," J.A. 186, the district court held that they could not be considered to rebut the testimony of Dr. McGill, on whose opinion Chevron had relied in rejecting Echazabal. J.A. 186-190. Accordingly, the district court granted summary judgment to Chevron. J.A. 190.

On appeal, Echazabal argued that the district court had improperly excluded the Fedoruk and Gitnick declarations, which declarations established that he would not have posed a significant risk to his own health or safety had he continued working at the refinery. But the court of appeals did not reach that question, because it concluded that the ADA does not permit an employer to exclude an individual with a disability based on a fear of on-the-job harm to that individual. J.A. 207-212. It accordingly reversed the grant of summary judgment to Chevron. J.A. 212. Judge Trott dissented. J.A. 213-217.

SUMMARY OF ARGUMENT

I. This case presents the question whether an employer may refuse to hire an individual with a disability because it believes that his disability poses too great a risk to his *own* health or safety. When Congress adopted the Americans with Disabilities Act, it specifically

rejected any such threat-to-self justification for excluding individuals with disabilities. The "direct threat" defense of 42 U.S.C. § 12113(b) is by its terms limited to cases in which the excluded individual "pose[s] a direct threat to the health or safety of *other individuals* in the workplace." 42 U.S.C. § 12113(b) (emphasis added). This language marks a significant departure from the EEOC's prior regulations implementing the Rehabilitation Act. By removing safety risk questions from the "qualified individual" prong of the plaintiff's case, and expressly limiting any safety risk defense to cases involving risks to others, Congress plainly rejected the EEOC's earlier approval of exclusions of individuals with disabilities based on risks they may pose to themselves.

Congress's rejection of a threat-to-self defense reflects a general prohibition on paternalistic discrimination. Like similar restrictions imposed on women, restrictions imposed on individuals with disabilities for their own "protection" have historically been a significant means by which those individuals have been deprived of opportunities. In its jurisprudence under Title VII of the Civil Rights Act of 1964, this Court has held that employers may not exclude women based solely on concerns for their own safety. The ADA adopts the same rule in the context of disability discrimination. Congress made no exception for cases in which an employer's paternalistic concern for the safety of an individual with a disability rests on a purportedly individualized medical judgment.

II. Chevron relies on the ADA's general defense for "qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). But the general "qualification standards" defense, of which the

"direct threat" defense is a subset, cannot be read to undermine the specific limitations that Congress wrote into the "direct threat" provision. To recognize this is not, contrary to Chevron's argument, to ignore the inclusive language of the direct threat provision. It is simply to recognize that inclusive language is not necessarily all-inclusive. Whatever else it embraces, the general "qualification standards" defense cannot justify an employer's decision to single out an individual with a disability for exclusion based on risks he poses to himself, for that would render meaningless the specific threat-to-others limitation that Congress carefully placed in the direct threat provision.

Even if Congress had not foreclosed a threat-to-self defense in the "direct threat" provision, the ADA's text and structure would not permit Chevron to assert such a defense under the general "qualification standards" provision. First, Congress limited the "business necessity" defense to cases where the application of *neutral* selection criteria screens out an individual with a disability. There is no business necessity defense to disparate treatment, as occurred here when Chevron concluded, solely because of his disabling impairment, that Echazabal posed too great a risk to be hired. Second, the impact of injuries and absences necessarily varies greatly from business to business, and the ADA requires any business necessity defense to be established on a job-specific, employer-specific basis. But Chevron has made no attempt to explain why a no-threat-to-self condition is necessary to serve the interests of its particular business. Finally, Chevron's fears of liability for hiring an individual like Echazabal are groundless.

For all of these reasons, the EEOC regulation that adopts a threat-to-self defense is not a permissible construction of the statute. Even under that regulation, however, Chevron was not entitled to summary judgment. The record makes clear that Chevron did not conduct the required inquiry into the most current medical knowledge and the best available objective evidence when it decided to exclude Echazabal. Had Chevron conducted such an inquiry, it would have been forced to conclude that Echazabal faced no significant risk from working at the coker unit.

III. There is no doubt that Echazabal is a "qualified individual with a disability." The ADA defines "qualified individual" solely in terms of an individual's current ability to perform tasks that are required of incumbents in the job he seeks. Echazabal was fully capable of performing all of the job tasks of the position for which he applied in the coker unit. The chance that he might, at some indeterminate point in the future, become unable to perform those tasks because of a workplace illness simply has no place in the "qualified individual" inquiry.

ARGUMENT

I. In Crafting the "Direct Threat" Provision, Congress Plainly Rejected Any Defense Based on a Risk to the Employee's Own Health or Safety

A. The ADA's Text Makes Plain the Decision to Eschew any Threat-to-Self Defense

Title I of the ADA generally prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). On its face, this prohibition clearly

embraces Chevron's exclusion of Echazabal from employment based solely on his chronic liver disease – an impairment that Chevron has conceded for present purposes to be a "disability" (Pet. Br. 3 n.1). In defense of that action, Chevron invokes the EEOC's regulation that permits an employer to exclude an individual with disabilities who "pose[s] a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added). But that regulation is squarely inconsistent with the statute it purports to implement. When Congress crafted the *statutory* "direct threat" provision – which permits an employer to exclude an individual with disabilities who "pose[s] a direct threat to the health or safety of *other individuals* in the workplace," 42 U.S.C. § 12113(b) (emphasis added) – it plainly rejected discrimination based on an asserted threat to the individual with disabilities himself.

1. As this Court has observed, Congress modeled the ADA to a significant extent on the Rehabilitation Act of 1973 and its implementing regulations. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998). Contrary to Chevron's suggestion (Pet. Br. 19-20), however, Congress did not incorporate the prior Rehabilitation Act rules wholesale. Congress intended the new statute to "grant *at least as much* protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 632 (emphasis added) (citing 42 U.S.C. § 12201(a), which provides that nothing in the ADA "shall be construed to apply a lesser standard" than the Rehabilitation Act or its regulations). Where the ADA's provisions accord greater protection to people with disabilities than had been available under the earlier law, it is those provisions, and not prior interpretations of the Rehabilitation Act, that govern.

At the time the ADA was enacted, neither the Rehabilitation Act nor its implementing regulations contained any specific defense for employers who could show that an individual with a disability would pose a safety risk. Instead, the statute and regulations addressed the issue in the context of the plaintiff's obligation to prove that he was an "otherwise qualified individual with handicaps." 29 U.S.C. § 794(a) (1988). The statute itself did not define the crucial term "qualified," but it expressly excluded from the definition of "individual with handicaps" two classes of people who posed a risk to *others*: (a) alcoholics or drug abusers "whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others," 29 U.S.C. § 706(8)(B) (1988); and (b) individuals with a "currently contagious disease or infection," who, "by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals," 29 U.S.C. § 706(8)(C) (1988).[6]

These two provisions aside, the Rehabilitation Act contained no more general discussion of safety risks in employment, and the implementing regulations adopted by various federal agencies differed in their treatment of the question. For purposes of employment *by agencies of the federal government itself*, EEOC regulations defined "qualified handicapped person" to mean "a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in

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[6] The latter provision effectively codified *School Board* v. *Arline*, 480 U.S. 273, 287 n.16 (1987) ("A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.").

question without endangering the health or safety of *the individual* or others." 29 C.F.R. § 1613.702(f) (1990) (emphasis added). As Chevron's amicus points out, a number of lower-court cases paid lip service to the EEOC's threat-to-self disqualification (see Chamber Br. 13), though none of the cited cases actually upheld the exclusion of an individual based solely on a threat he posed to himself.

In contrast to the EEOC, regulations issued by the Departments of Justice, Labor, and Health and Human Services to govern employment *by recipients of federal financial assistance* contained no such "health or safety of the individual" language. They simply defined "qualified handicapped person" to mean "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 28 C.F.R. 42.540(*l*)(1) (1990) (Department of Justice); accord 45 C.F.R. § 84.3(k)(1) (1990) (Department of Health and Human Services); see also 29 C.F.R. § 32.3 (1990) (Department of Labor) (similar "essential functions" language).

2. Given this unsettled background, Congress could not simply have carried forward prior understandings of the Rehabilitation Act, for there was no single, consistent understanding of how the statute treated safety risks. Instead, Congress chose to address the issue of safety risks squarely in the text of the ADA. It did so in a way that plainly foreclosed a threat-to-self defense.

First, Congress added a new definition of "qualified individual with a disability." 42 U.S.C. § 12111(8). That provision tracked the Rehabilitation Act regulations of the Departments of Justice, Labor, and Health and Human Services – but *not* those of the EEOC – by defining "qualified" solely in terms of the ability to "perform

the essential functions" of the job. *Ibid.* Congress thus largely removed considerations of potential safety risks from the "qualified individual" element of the plaintiff's case and instead required the plaintiff to show only that he is capable of performing the tasks required of employees in the position he seeks. See Part III, *infra.*

Second, Congress added a new "direct threat" provision that explicitly permitted employers to justify discrimination based on purported safety risks, but only as an affirmative defense. See 42 U.S.C. § 12113(b). Congress limited application of that defense to instances where the employer could show a "significant risk" that could not "be eliminated through reasonable accommodation." 42 U.S.C. § 12111(3). And most pertinent here, it eliminated the language of the prior EEOC regulations that permitted discrimination against an individual who posed a risk to *his own* safety. Instead, Congress limited the safety risk defense to those individuals who would "pose a direct threat to the health or safety of *other individuals* in the workplace." 42 U.S.C. § 12113(b) (emphasis added). Congress repeated this limitation in its definition of "direct threat," which defined the term as "a significant risk to the health or safety of *others*." 42 U.S.C. § 12111(3) (emphasis added).

Congress thus plainly rejected any "threat to self" defense in the ADA. This Court has recently reemphasized that it "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language." *Chickasaw Nation* v. *United States*, 122 S. Ct. 528, 534 (2001) (internal quotation marks omitted). And this is not a case where Congress merely failed to enact a legislative proposal containing a "threat to self" defense. Congress made an affirmative

change to the existing statutory and regulatory definitions of "qualified individual" under the Rehabilitation Act – a change that closed the definitional gap that had permitted the EEOC to define "qualified" to exclude individuals who might endanger their *own* health or safety and substituted a new statutory "direct threat" defense that was expressly limited to risks to "others." These actions are plainly inconsistent with the recognition of a "threat to self" defense in the ADA.

B. The Omission of a Threat-to-Self Defense Reflects Congress's Rejection of Paternalistic Discrimination Against Individuals with Disabilities

1. The clear textual difference between the EEOC's Rehabilitation Act regulations (which specifically permitted exclusion based on threats to self) and the ADA's "direct threat" provision (which is limited to threats to others) demonstrates that the omission of threat-to-self language from the ADA did not reflect a merely cosmetic desire to reassure the public that the statute would protect against threats to public safety. Cf. Pet. Br. 30 n.12. That omission also reflected a substantive decision that no threat-to-self defense would be permitted under the ADA. Consideration of Congress's articulated purposes for the ADA bolsters this conclusion.

As Congress recognized, restrictions placed on individuals with disabilities for their own "protection" have often led to unnecessary denial of opportunities. In the hearings that preceded enactment of the ADA, witnesses repeatedly identified paternalistic practices as one of the most significant means by which people with disabilities

had experienced disadvantage.[7] Consistent with that testimony, the statutory findings list "overprotective rules and policies" as among the "forms of discrimination" against people with disabilities that "continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2), (5).

As this Court has noted, women have also been deprived of countless opportunities because of restrictions imposed on them for their own "protection." See, *e.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 & n.10 (1982); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-685 (1973) (plurality opinion). Title VII of the Civil Rights Act

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[7] See, *e.g.*, *Americans with Disabilities Act: Hearing Before the House Committee on Small Business*, 101st Cong., 2d Sess. 126 (Feb. 22, 1990) (testimony of Arlene Mayerson) ("[L]ike women, disabled people have identified 'paternalism' as a major obstacle to economic and social advancement."); *Americans with Disabilities Act: Hearings Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation*, 101st Cong., 1st Sess. 288 (Sept. 20, 1989) [hereinafter *Public Works Hearing*] (testimony of James Gashel) ("Paternalism is the most common form of discrimination against blind people."); *Americans with Disabilities Act of 1989: Hearings Before the Senate Committee on Labor and Human Resources*, 101st Cong., 1st Sess. 12 (May 9, 1989) (testimony of Dr. I. King Jordan) ("For deaf people, the problem was not so much one of segregation, but one of paternalism and communication isolation."); see also *Americans with Disabilities Act of 1989: Hearings Before the House Committee on the Judiciary*, 101st Cong., 1st Sess. 41 (Aug. 3, 1989) (testimony of James Brady); *Public Works Hearing*, *supra*, at 49 (testimony of Justin Dart); *Americans with Disabilities Act of 1988: Joint Hearing Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources and the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong., 2d Sess. 75 (Sept. 27, 1988) (testimony of Judith Heumann).

of 1964 – one of the models for ADA Title I – responds to that problem by prohibiting an employer from excluding women based on concerns for their own safety. Where an employer has discriminated against women based on well-established risks to the health or safety of *others*, that conduct has often been upheld under Title VII's bona fide occupational qualification (BFOQ) defense. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 202-203 (1991) (citing cases); *Dothard* v. *Rawlinson*, 433 U.S. 321, 335-336 (1977) (upholding discrimination against female prison guards on ground that the likelihood of inmate assaults on such guards would pose a threat "to the basic control of the penitentiary and protection of its inmates and other security personnel"). But where an employer excludes women based solely on concerns for their *own* safety, the statute provides no defense. See *Dothard*, 433 U.S. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."); see also *Johnson Controls*, 499 U.S. at 202 (reiterating *Dothard*'s suggestion that "danger to a woman herself does not justify discrimination"). Given Congress's recognition of the role of paternalism in limiting opportunities for people with disabilities, the omission of threat-to-self language from the ADA's "direct threat" provision plainly reflects a decision to hew to the same risk-to-self/risk-to-others distinction as applies under Title VII – for the same reasons that it applies under Title VII.

2. Contesting this point, Chevron devotes nearly six pages of its brief (Pet. Br. 34-40) to a parsing of the ADA's legislative history. But Chevron cannot overcome the fact

that the several *specific* references to the threat-to-self issue in the legislative history confirm what the text of the statute makes clear: Because "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals," these references emphasize that "[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." H. R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 72, 74 (1990); accord H.R. Rep. No. 485, Part 3, 101st Cong., 2d Sess. 34, 42 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. 38 (1989); see also, *e.g.*, 136 Cong. Rec. S9697 (July 13, 1990) (statement of Sen. Kennedy); 136 Cong. Rec. H4623 (July 12, 1990) (statement of Rep. Owens); see also 136 Cong. Rec. E1914 (June 13, 1990) (statement of Rep. Hoyer).

Chevron suggests that Congress would not have considered an exclusion "paternalistic" if it was based on a reasonable and individualized assessment of the plaintiff's medical condition. Pet. Br. 35-38. But a decision can be paternalistic – an effort by one person to decide what is in the interest of another – without being wrong on the merits. Had Congress wished to permit paternalistic discrimination in cases where an employer could satisfy a court that the exclusion of a particular individual with a disability was medically justified, it would have included threat-to-self language in the "direct threat" provision, which requires just such an individualized medical justification. See *Bragdon*, 524 U.S. at 649 (direct threat analysis requires a risk assessment "based on medical or other objective evidence"); *Arline*, 480 U.S. at 287 (requiring an individualized assessment). Chevron's tenuous inferences from a handful of passages in the legislative

history[8] cannot overcome Congress's clear decision to omit such threat-to-self language from the statute.

To be sure, Congress's prohibition of paternalistic discrimination reflects a conclusion that such conduct is often "*over*protective" – that it often rests on an incorrect assessment of the risks that individuals with disabilities would face. 42 U.S.C. § 12101(a)(5) (emphasis added). But Congress soundly decided not to permit employers to seek to persuade courts in individual cases that their

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[8] Chevron relies (Pet. Br. 36) on the statement that "[g]eneralized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability." H.R. Rep. No. 485, Part 2, *supra*, at 74. But that passage merely emphasizes that generalized fears of self-injury are among the paternalistic concerns that may not be used to justify discrimination; it does not say that particularized fears of self-injury *may* justify discrimination. Chevron also reads two passages suggesting that employers may sometimes exclude applicants based on x-ray results (one of which refers to a risk of "substantial harm" without clarifying whether harm to self or harm to others was at issue) as supporting the existence of a threat-to-self defense (see H.R. Rep. No. 485, Part 2, *supra*, at 73), for, Chevron contends, x-rays will rarely reveal conditions that pose a risk to others (Pet. Br. 37). But x-rays will reveal some conditions, such as tuberculosis, that can pose a risk to others, and they can also reveal conditions that will prevent an employee from performing the productive functions of the job and thus make him un-"qualified." Finally, Chevron points (Pet. Br. 38) to a statement in the House Judiciary Committee report that an individual with a serious allergy to a particular paint would be entitled to demand, as a reasonable accommodation, that his employer not assign him to work with that paint. See H.R. Rep. No. 485, Part 3, *supra*, at 29. That passage says nothing about a case where the individual with a disability *seeks* to work under conditions that his employer believes would pose a risk to him. Cf. 42 U.S.C. § 12201(d).

protectivist determinations were correct. Even the most "individualized" assessments of future safety risks are typically probabilistic. It is the rarest of cases in which a doctor can say, with absolute certainty, that a particular individual with a particular diagnosis *will* experience death or disabling injury within a given period of time – and none of Chevron's doctors ever made such a statement here (see pp. 1-5, *supra*). The most a physician can typically do is reach an intuitive or statistical conclusion, based on experience with other individuals with the same diagnosis in similar environments, that the individual is more likely to experience such harm. See William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 Psychol. Pub. Pol'y & L. 293, 305-309, 314 (1996). For this and other reasons, "the assessment of risk to a given applicant or employee, even by the most experienced physician, is no more than an educated guess." Mark A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 Mich. L. Rev. 1379, 1417 (1983) (internal quotation marks omitted).

While it might be acceptable to rely on such probabilistic judgments where risks to *others* are at issue, here it is the individual with a disability himself who bears the most direct and significant costs of an incorrect determination that a job is safe for him. When an individual with a disability takes a job that his employer believes to pose a risk to him, he is not, contrary to Chevron's suggestion (Pet. Br. 29), seeking the employer's complicity in "suicide." At most, like an individual who refuses to give up fatty foods or to quit smoking, he is simply making a choice about the risks he is willing to tolerate.

Congress sensibly trusted people with disabilities not to make suicidal decisions,[9] and it sensibly refused to permit employers to use an employee's disability as a justification for overriding his choices about the risks he is willing to accept.

II. The General "Qualification Standards" Defense Cannot Justify Singling Out an Individual for Exclusion Because of a Concern That His Disability Poses Risks to His Own Safety

A. The General "Qualification Standards" Provision May Not be Read to Undermine the Specific Limitations Congress Placed on the "Direct Threat" Defense

Chevron does not rely on the statutory "direct threat" provision to defend its exclusion of Echazabal. The company instead stakes its case on the general "qualification standards" defense in 42 U.S.C. § 12113(a), of which Section 12113(b)'s "direct threat" defense is a subset. Chevron argues (Pet. Br. 20-29) that the refusal to hire an individual whose disability will pose a significant risk

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[9] Both the record in this case and the examples cited by Chevron (Pet. Br. 21) reveal what common sense suggests: People with disabilities are no more likely than anyone else to seek employment that will kill them. See, *e.g.*, *Foreman* v. *Babcock & Wilcox Co.*, 117 F.3d 800, 803-804, 809-810 (5th Cir. 1997) (employee whose pacemaker would malfunction if he worked too close to high-voltage equipment requested, as a reasonable accommodation, that he be assigned to a position that did *not* require dangerous proximity to such equipment); *Patterson* v. *Summers*, 2000 WL 366113 (E.E.O.C. 2000) (individual with serious allergy to inks and dyes requested, as a reasonable accommodation, that he be transferred to position that would *keep him away* from those substances and permitted to use a respirator when he was required to be near them).

to himself is a "qualification standard[ ]" that is inherently "job-related and consistent with business necessity." *Ibid.* That argument is fundamentally flawed.

As we have shown, Congress in the "direct threat" provision squarely rejected any defense that would permit an employer to exclude an individual with a disability based solely on a threat to that individual himself. Given the specific attention Congress gave to the risk-to-self issue in crafting the direct threat provision of Section 12113(b), Congress surely did not intend to permit employers to evade the limitations of that provision by asserting a threat-to-self defense under the general "qualification standards" language of Section 12113(a). It is "a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That is particularly true where, as here, the specific and the general provisions "are interrelated and closely positioned" as part of the same section of the statute, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (*per curiam*), and applying the general provision "would undermine limitations created by a more specific provision." *Verity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996).

To recognize this point is not to disregard the inclusive language of Section 12113(b). Cf. Pet. Br. 29-33. Inclusive language is not necessarily *all*-inclusive. A provision listing examples of what Congress included can also illustrate what it excluded. For example, lower courts have consistently interpreted 42 U.S.C. § 12111(9), which provides that reasonable accommodations "*may include* . . . reassignment to a *vacant* position" (emphasis added),

as implying that – whatever else the term "reasonable accommodation" includes – it does not include accommodations that would remove other employees from their jobs "in order to accommodate a disabled coworker." *E.g.*, *Eckles* v. *Consolidated Rail Corp.*, 94 F.3d 1041, 1047 (7th Cir. 1996), cert. denied, 520 U.S. 1146 (1997).

The threat-to-others language in Section 12113(b) serves a similar function. Section 12113(b)'s "direct threat" provision plainly does not set forth the *only* "qualification standard" that may be asserted under Section 12113(a). Even if it set forth the only *safety-based* qualification standard that an employer could assert, the general Section 12113(a) defense would still be available for a wide range of qualification standards employers impose for reasons of productivity rather than safety (such as a requirement that applicants be able to lift 50 pounds). And Section 12113(a) might also provide a defense for the application of safety-based selection criteria that are facially neutral (such as a requirement that applicants for a lifeguard position tread water for thirty minutes). That is the import of the inclusive language of Section 12113(b)'s "direct threat" provision. But the general "qualification standards" provision could not justify the singling out of an individual for exclusion based on a safety risk assertedly caused by his disability where the terms of the statutory "direct threat" defense are not satisfied. If it could, the limitations Congress specifically wrote into that defense would be rendered meaningless.

An analogy illustrates the point. In addition to limiting the "direct threat" defense to cases involving risks to "others," Congress also limited that defense to cases involving "significant" risks. 42 U.S.C. § 12111(3). Hiring an individual who poses an entirely fanciful risk to others

may, because of the irrational fears of co-workers, harm company morale and impair workplace efficiency. Cf. Pet. Br. 22-23 (arguing that harms to morale and efficiency justify a threat-to-self defense). But surely an employer could not justify exclusion of an individual who posed an insignificant risk under the general "qualification standards" defense, for to do so would render meaningless the specific "significant risk" limitation Congress carefully placed in the "direct threat" provision. So too with individuals who pose risks only to themselves: To permit discrimination against such individuals would render meaningless the specific threat-to-others limitation Congress carefully placed in the "direct threat" provision.

Indeed, Chevron's broad interpretation of the "qualification standards" provision turns the Section 12113(b) direct threat provision into nothing more than surplus language. If the refusal to hire someone whose disability poses a direct threat to *himself* can always be justified under Section 12113(a)'s general language as a "qualification standard" that is "job-related and consistent with business necessity," then the refusal to hire someone whose disability poses a direct threat to *others* can be justified in exactly the same way. Employers plainly have a stronger business interest in preventing their employees from creating risks to others than they do in protecting individual employees from themselves. See *Johnson Controls*, 499 U.S. at 202-203; *Dothard*, 433 U.S. at 335. It is a substantial strike against Chevron's broad reading of the general qualification standards provision that such a reading would "in practical effect render" the specific and carefully crafted direct threat provision "entirely superfluous." *TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 447 (2001).

B. By Its Terms, the General "Qualification Standards" Defense Does Not Apply to an Employer's Decision to Single Out an Individual with a Disability for Exclusion Based on Asserted Safety Risks

Even if Congress had not addressed the question in the "direct threat" provision, an employer still could not use the general "qualification standards" defense to justify the kind of conduct Chevron engaged in here – intentional exclusion of an individual with a disability because of a concern that his disability created a risk to himself. The statute makes clear that Section 12113(a)'s "qualification standards" provision affords a "business necessity" defense only for neutral selection criteria that incidentally exclude individuals with disabilities. That provision affords no defense for an employer's decision to single out an individual for exclusion on the basis of his disabling impairment.

1. Chevron's exclusion of Echazabal was a classic case of disparate treatment. Although the motivation for that exclusion may have been to protect Echazabal's safety, his diagnosis with a disabling impairment was the *only* reason that Chevron believed Echazabal would be in danger. Chevron's action "does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's [diagnosis with a disabling impairment] would be different." *City of Los Angeles, Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted).[10] Chevron

[10] Chevron's attempt to distinguish *Johnson Controls* (Pet. Br. 37 n.15) thus fails. The conclusion that the employer had engaged in disparate treatment was the linchpin of the *Johnson Controls* Court's analysis. See 499 U.S. at 197-200.

thus violated the ADA's general prohibition on discriminating against an individual "because of the disability of such individual." 42 U.S.C. § 12112(a); see also 42 U.S.C. § 12112(b)(1) (prohibiting actions "that adversely affect[ ] the opportunities or status of" an applicant or employee "because of" that individual's disability). This is true even if Hepatitis C is not invariably a statutory "disability." *Echazabal's* Hepatitis C is a "disability," Chevron has conceded, so the company's exclusion was plainly "because of" an "impairment" – that disease – that "substantially limits one or more of the major life activities of [Echazabal as an] individual." 42 U.S.C. § 12102(2)(A); see *Arline*, 480 U.S. at 278, 281-286 (exclusion based on feared risks of contagion was "solely by reason of [plaintiff's] handicap" under the then-current language of the Rehabilitation Act, when plaintiff's infection with a "handicap"-ing case of tuberculosis was the sole basis for the fear of contagion).

The ADA Title I provisions that prohibit discrimination "because of" disability, Sections 12112(a) and 12112(b)(1), contain no exception for discrimination that is "job-related and consistent with business necessity." Such an exception appears only in the statute's screening-out provision, which defines discrimination to include (42 U.S.C. § 12112(b)(6) (emphasis added)):

> using qualification standards, employment tests or other selection criteria that *screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

This provision targets cases where a generally applied, facially neutral job criterion has the effect of denying an opportunity to an individual with a disability. Congress's use of the term "screen out" (instead of the "because of" language that appears in the disparate treatment provisions) makes this clear. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 428 n.3 (1971) (using "screen out" language in describing practices that have the *effect* of excluding particular individuals or classes). The paradigm case is of "a physical criterion that an applicant be able to lift fifty pounds." H.R. Rep. No. 485, Part 2, *supra*, at 56. Such a criterion does not reflect disparate treatment, for the question whether an applicant has a disabling impairment plays no part in the employer's decisionmaking process – unlike here, where the employer believed the plaintiff disqualified solely because of his diagnosis with such an impairment. But the criterion may nevertheless exclude an individual who, as a result of a disability, is unable to satisfy it. The screening-out provision in Section 12112(b)(6) makes clear that such an exclusion is unlawful under the ADA unless the criterion is job-related and consistent with business necessity.

As both Chevron and the Solicitor General recognize (Pet. Br. 3, 17; U.S. Br. 8-9), the Section 12113(a) "qualification standards" defense walks in tandem with Section 12112(b)(6)'s screening-out prohibition. Both provisions extend only to cases involving an application of "qualification standards, tests, or selection criteria." And both provisions use the "screen out or tend to screen out" language of discriminatory effect rather than the "because of" language of the statute's disparate treatment provisions. Section 12113(a) adds to the earlier provision by clarifying that the showing of job-relatedness and business necessity is a "defense" on which the employer

bears the burden of proof. 42 U.S.C. § 12113(a). Had Congress not made that clarification, courts might well have concluded, in light of this Court's holding in *Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642, 659 (1989) (plaintiff bears the burden of persuasion on the business justification issue in a Title VII disparate impact case), that the burden of proof on that issue rested on the plaintiff. Section 12113(a) thus simply establishes the burden of proof on the "business necessity" issue in a case where an individual has been screened out by a facially neutral qualification standard. It provides no defense for disparate treatment. The EEOC's own regulations appear to recognize this point. See 29 C.F.R. § 1630.15(b)(1), (c) (limiting "business necessity" defense to cases of discriminatory effect); 29 C.F.R. Pt. 1630 App. (interpretive guidance to § 1630.15(b) and (c) headed "Disparate Impact Defenses").

2. This is not a mere technical point. Instead, it shows why Chevron's actions lie near the heart of the conduct Congress sought to prohibit in the ADA. As Congress was aware, "the fear of injury, as well as increased insurance or worker's compensation costs" – precisely the fears on which Chevron relies (Pet. Br. 23-24) – are "common barriers to employment for persons with disabilities." H.R. Rep. No. 485, Part 3, *supra*, at 31. Such fears may well be justified for various classes of people with disabilities in the aggregate. See Craig Zwerling, et al., *Occupational Injuries among Workers with Disabilities, in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 315, 325 (Peter David Blanck, ed., 2000) (results of four nationally representative studies "strongly support" the conclusion that "workers with a range of disabilities are at increased risk for occupational

injuries"). But they will not eventuate for all of the *individuals* in those classes. If employers had been permitted to rely on generalizations about the likely injury costs that would attend hiring people with particular impairments as a "business necessity" justification for excluding them, the ADA's protections would have been eviscerated – as the statute's key supporters recognized.[11] Cf. *Morse* v. *Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring in the judgment) (concluding that Voting Rights Act covers political parties because "[i]n 1965, to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a mountain").

Accordingly, when Congress crafted the ADA's general nondiscrimination provision, it used language that, like the language of Title VII, is unambiguously "focus[ed] on the individual." *Manhart*, 435 U.S. at 708; compare *ibid.* ("The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.") (quoting 42 U.S.C. § 2000e-2(a)(1); emphasis in *Manhart*), with 42 U.S.C. § 12112(a) (making it unlawful to "discriminate against a qualified *individual* with a disability because of the disability of such *individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and

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[11] See 136 Cong. Rec. H4624 (July 12, 1990) (statement of Rep. Edwards); 136 Cong. Rec. S9697 (July 13, 1990) (statement of Sen. Kennedy).

privileges of employment") (emphasis added). This language prohibits employers from excluding people with a given disabling impairment based on the probabilistic risks faced by all individuals with the same diagnosis. As under Title VII, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708.

This case provides a perfect example of what Congress sought to prohibit. Although Chevron claims to have engaged in an "individualized" analysis (Pet. Br. 35), *none* of its witnesses could testify that Echazabal was certain to experience a debilitating illness or death as a result of working at the refinery. The most credentialed witness to whom Chevron points, Dr. Tang, could not even state that there was anything more than a one per cent chance of such a result, and he could not say whether it would occur in "a few hours" or in "months and years." J.A. 83-84, 86-88. The most he could say was that "it's individualistic, and it's – all I know [is] it occurs, and when it occurs, it's the person that suffers that gets hurt." J.A. 86. But the fact (if it is one) that *some* people with uncontrolled Hepatitis C will get hurt cannot justify excluding *all* people with that condition. As with women's generally longer life expectancy, which *Manhart* held insufficient to justify an employer's assumption that any individual woman would live longer than most men, "there is no assurance that any individual" with Hepatitis C "will actually fit [Dr. Tang's] generalization." *Manhart*, 435 U.S. at 708.

3. Recognizing that Congress limited the general "qualification standards" defense to cases involving neutral employment criteria also helps to explain why

Congress saw the need to state, in Section 12113(b), that the "qualification standards" defense can be satisfied by a showing that the plaintiff "pose[s] a direct threat to the health or safety of other individuals." 42 U.S.C. § 12113(b). Cf. p. 25, *supra* (noting that Chevron's reading gives the direct threat provision no independent meaning). Although the general Section 12113(a) defense applies only when employers enforce neutral job criteria that apply to all employees regardless of impairment status, the "direct threat" provision extends that defense to a limited class of cases in which employers intentionally discriminate based on the "individual" plaintiff's disabling impairment, 42 U.S.C. § 12113(b). See *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000) (difference in language between Section 12113(a) and Section 12113(b) suggests that "business necessity applies to across-the-board rules, while direct threat addresses a standard imposed on a particular individual").[12] Had Congress not enacted Section 12113(b), employers could not have justified singling out individuals for disabilities for exclusion based on proven safety risks to others. But in no event can employers justify singling out individuals with disabilities for exclusion based on purported risks to themselves.

[12] To the extent that the Fifth Circuit's opinion in *Exxon* suggests that blanket exclusions of *all* individuals with a given disability may be justified under the general "qualification standards" provision (cf. *Exxon*, 203 F.3d at 875), that is incorrect. Such exclusions are "because of" disability and thus would violate the ADA's disparate treatment provisions, to which the "qualification standards" defense does not apply.

C. The Desire to Protect Employees from Posing Risks to Themselves Cannot Be Justified as "Job-Related and Consistent with Business Necessity"

The EEOC's threat-to-self defense has another fatal flaw. As this Court has explained under Title VII, the "business necessity" determination must be based on an examination of the *specific* requirements of the job at issue and the *particular* exigencies of the employer's business. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 427 (1975) (stating that the "question of job relatedness must be viewed in the context of the [defendant's] plant's operation"); *Griggs*, 401 U.S. at 431 (requiring, under business necessity defense, that challenged test "bear a demonstrable relationship to successful performance of the jobs for which it was used"). The ADA similarly provides that qualification standards that exclude individuals with disabilities are impermissibly discriminatory unless they are, at a minimum, "job-related *for the position in question*." 42 U.S.C. § 12112(b)(6) (emphasis added). But Chevron does not point to any imperatives *specific to its own business* that justify excluding individuals who pose a threat to themselves. Instead, relying on various articles from human resources publications that refer generally to the costs of workplace injuries (Pet. Br. 22-24, 28-29), Chevron argues in the abstract that a no-threat-to-self condition is *always* job-related and consistent with business necessity. But examination of the business justifications proffered for the threat-to-self defense demonstrates that such a defense is not *always* – and has not been proven here to be – "job-related and consistent with business necessity."

The "ethical quandary" (Pet. Br. 28) faced by an employer who believes that an individual with a disability

will harm himself by performing the job simply does not satisfy the statutory test. The ADA "does not prevent the employer from having a conscience." *Johnson Controls*, 499 U.S. at 208. But it does prohibit exclusionary criteria that are not "job-related." A fear that an employee will injure himself or become ill is not inherently "job-related," because injuries and illnesses do not necessarily "affect an employee's ability to do the job." *Id.* at 201-202 (interpreting "occupational" element of Title VII's "bona fide occupational qualification" defense, which element the Court described as limited to "job-related" qualifications).

Of course, in a particular case an injury may affect the ability of an employee to perform the job by rendering him permanently unable to return to the job. Chevron argues (Pet. Br. 22) that the threat-to-self defense is justified by the imperative to avoid the costs of job turnover in such circumstances. But many injuries that would create sufficiently "substantial harm" to trigger the EEOC's threat-to-self defense (see 29 C.F.R. § 1630.2(r)) – losing a foot, for example, or contracting a chronic disease – would not likely render an employee unable to do the job. And even as applied to injuries and illnesses that would make an employee unable to return to work, the interest in assuring consistency in the workforce could not satisfy the stringent "job-related and consistent with business necessity" test unless the employer could show, by reference to the operations of its own business, a particularized need to assure that employees do not leave their jobs within the time frame during which the risk to the plaintiff would likely eventuate.

Employees constantly leave their jobs for reasons that have nothing to do with workplace injuries. See Philip

Harvey, *An Analysis of the Principal Strategies That Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMPLOYMENT & LAB. L. 677, 733-737 (2000) (collecting statistics showing rampant job turnover in the United States). And workplace injuries are themselves widespread: 5,100 workers died and 3.8 million experienced disabling injuries on the job in 1998. NATIONAL SAFETY COUNCIL, INJURY FACTS 54 (1999). Employees in that year missed a total of 125 million days of work due to on-the-job injuries. *Id.* at 51.

The impact – whether on overall efficiency, on corporate reputation and morale, or on worker's compensation premiums[13] (cf. Pet. Br. 22-24) – of hiring an employee with a disability who subsequently misses work because of an injury is thus likely to vary widely. In some businesses (where job turnover and injury rates are low and production processes do not readily accommodate changes in or absences of employees), an employee who misses work or cannot return to work could have a significant effect. In other businesses, an employee who misses

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[13] Worker's compensation is not a liability regime but an insurance scheme that guarantees a small benefit – far less than in tort – to injured workers. See 1 ARTHUR LARSON & LEX K. LARSON, WORKER'S COMPENSATION 1-9 to 1-11 (Desk ed. 2001). Several features of the worker's compensation system cushion the already limited financial impact of an award in this context: notably, the institutionalized availability of insurance, see 3 *id.* at 150-2 to 150-3, with regulation of the degree of experience rating, see 3 *id.* at 150-17 to 150-19; and the availability of "second-injury funds" and other devices to protect an employer against full responsibility for providing compensation where an on-the-job injury exacerbates a pre-existing disability, see 2 *id.* at 91-1 to 91-48.

work or cannot return to work may hardly be noticed. The costs of employee injuries simply cannot justify the EEOC's threat-to-self defense across the board. Cf. *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F.3d 638, 647-648 (1st Cir. 2000) (whether an extended absence from work makes the plaintiff unable to perform essential job functions must be determined based on all the facts of the case).

D. The Fear of Liability Does Not Justify Singling Out Individuals with Disabilities for Exclusion Based on Risks They Might Pose to Themselves

Nor can Chevron's speculative fears of liability justify the EEOC's threat-to-self defense. Chevron places significant reliance (Pet. Br. 24-25) on the requirements of the Occupational Safety and Health Act (OSH Act). If a specific rule adopted by the Occupational Safety and Health Administration (OSHA) required Chevron to exclude people with Hepatitis C from areas containing hydrocarbons, that rule would prevail. See *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 570-578 (1999). But there is no such OSHA rule here.[14]

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[14] The general statement of "policy" issued by an OSHA regional administrator in 1997 to the effect that "if an employee can perform their job functions in a manner which does not pose a safety hazard to themselves or others, the fact they have a disability is irrelevant," is not such a standard. Memorandum for Area Directors and District Supervisors from Linda R. Anku (Aug. 27, 1997) (available at http://www.osha-slc.gov/OshDoc/Interp_data/I19970827.html) (cited at Pet. Br. 24). Nor do the various guidelines issued by the National Institute for Occupational Safety and Health (NIOSH), which are not OSHA rules carrying the force of law, support Chevron's exclusion of Echazabal. See Pet. Br. 6-7 & n.4 (citing various guidelines

Instead, Chevron relies on the OSH Act's "general duty" clause, 29 U.S.C. § 654(a)(1). But the general duty clause, like the OSH Act generally (see *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 641 (1980) (plurality opinion)), imposes only a duty of *feasible* prevention. See MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 207-208, 213-214, 215-216 (4th ed. 1998). Where the ADA prevents an employer from excluding an employee with increased susceptibility to occupational harm, and the employer discloses the relevant risks to that employee and takes all feasible steps to mitigate those risks, the employer will face no prospect of liability

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available at http://www.cdc.gov/niosh/chem-inx.html). *Not a single one* of these guidelines states that people with chronic liver disease should be excluded from all positions entailing exposure to the substances that are present at the El Segundo refinery. Some state that a determination of risk depends on "the probable frequency, intensity, and duration of exposure, as well as the nature and degree of the condition." *E.g.*, *Benzene Guideline* 2 (1988); accord *Inorganic Lead Guideline* 2 (1988); see also *Napthalene Guideline* 1 (1978) (describing "liver damage" as a risk of "overexposure"); *Ethylenediamine Guideline* 1 (1978) (same); *Xylene Guideline* 1 (1978) (same). Others state that the relevant chemical "is not known as a liver toxin in humans," but that "the importance of this organ in the biotransformation and detoxification of foreign substances should be considered before exposing persons with impaired liver function." *Naptha (Coal Tar) Guideline* 1 (1978); accord *Octane Guideline* 1 (1978); *Heptane Guideline* 1 (1978). Still others state that liver function should be examined in a preplacement examination in order to obtain a baseline for future monitoring. *E.g.*, *Toluene Guideline* 1 (1978); *Phenol Guideline* 1 (1978); *Manganese Guideline* 1 (1978). None of these guidelines justifies Chevron's categorical exclusion of Echazabal from *any* exposure to *any* of these substances.

under that clause. Indeed, neither Chevron nor the government has identified a single case in which OSHA has initiated a general duty clause enforcement action in such circumstances.

Chevron's fear of state-law liability that would override the exclusivity of worker's compensation (Pet. Br. 25-28) is equally groundless. None of the cases cited by Chevron addresses a fact setting that is even remotely comparable to the one presented here. And none of the state workplace safety statutes cited by Chevron would make an employer strictly liable simply because it hired an employee whose disability presented a known risk to himself and who was subsequently injured on the job. To the contrary, *all* of these cases and statutes limit liability to instances where the employer is at *fault* for failing to eliminate the risk to the employee.[15] Where an employer,

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[15] Chevron (Pet. Br. 25-26) points to the California Labor Code, which provides administrative, civil, and potentially criminal sanctions for the failure to provide employees with an employment setting that is "safe and healthful." Cal. Labor Code § 6402. But the code defines "safe" and "health" in fault-based terms, as "such freedom from danger to the life, safety, or health of employees as the nature of the employment *reasonably* permits," *Id.* § 6306(a) (emphasis added), and it requires employers to take only those steps "*reasonably* necessary to protect the life, safety, and health of employees," *Id.* §§ 6401, 6403(c), 6406(d) (emphasis added). The New York workplace safety statute, applied in *Jamison* v. *GSL Enters., Inc.*, 711 N.Y.S.2d 413 (App. Div. 2000) (cited at Pet. Br. 26), is to similar effect: Employers must provide "reasonable and adequate protection" to their employees. N.Y. Labor Law § 200(1). And prosecutions for manslaughter also require fault, as *Granite Constr. Co.* v. *Superior Court*, 197 Cal. Rptr. 3, 5 (Ct. App. 1983) (applying statute that criminalizes death caused by action taken "without due caution and circumspection") (cited at Pet. Br. 27),

complying with the ADA's general prohibition on discrimination against employees with disabilities, hires an individual whose disability poses a risk to himself, informs the individual of that risk, and takes all reasonable steps to safeguard that individual's health, a court would have no basis for finding any fault on the part of the employer. In precisely parallel circumstances, this Court found the prospect of employer liability for fetal harm "remote at best" and insufficient to justify excluding fertile women from jobs that might damage their fetuses. *Johnson Controls*, 499 U.S. at 208.

In short, Chevron has not identified a single provision of state law that an employer would violate simply by hiring an individual whose disability creates an increased risk of workplace injury. If such a state law did exist, it would be preempted, for a state cannot make illegal a practice that is required by federal law. See *Johnson Controls*, 499 U.S. at 209 ("When it is impossible for an employer to comply with both state and federal

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makes clear. Two criminal cases cited by Chevron do not deal with the substantive standard of *liability* at all; they hold only that the OSH Act does not preempt otherwise proper state criminal prosecutions. See Pet. Br. 27 (citing *People* v. *Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 965 (Ill. 1989); *People* v. *Pymm*, 563 N.E.2d 1, 8 (N.Y. 1990)). Finally, the decision in *Russell* v. *Bush & Burchett, Inc.*, 2001 WL 1524554 (W.Va. 2001) (cited at Pet. Br. 26), similarly does not address the standard for employer liability. It simply reiterates that worker's compensation is not the exclusive remedy in cases where the employer has acted with "deliberate intention" to cause the injury. *Id.* at *4. Contrary to Chevron's suggestion (Pet. Br. 26 n.10), such intentional-injury exceptions to worker's compensation exclusivity are generally read extremely narrowly. See 2 LARSON & LARSON, *supra*, at 100-2 to 100-12, 103-1 to 103-46.

requirements, this Court has ruled that federal law preempts that of the States.").

Chevron effectively concedes that it *can* comply with both the ADA's nondiscrimination requirement and the mandates of workplace safety laws. See Pet. Br. 27-28. Its argument reduces to one of cost: Because the law imposes on it a general obligation to take reasonable or feasible steps to assure the safety of each individual it hires, Chevron believes it would be cheaper simply to exclude individuals whose disabilities might create an increased risk of workplace injury than to hire those individuals and take the steps the law requires to protect them. See *ibid.* If Echazabal were seeking a reasonable accommodation of general work rules, such cost concerns would at least be relevant – though Chevron would still have an obligation to establish an "undue hardship" by reference to the particulars of its operations, 42 U.S.C. §§ 12111(10), 12112(b)(5)(A). But where, as here, an individual with a disability seeks to perform exactly the same job as his coworkers, an employer cannot use a fear of the increased costs of protection to justify singling him out for exclusion on the basis of his disabling condition. As in *Johnson Controls*, Chevron may not "resort[ ] to an exclusionary policy" as "a method of diverting attention from [its] obligation to police the workplace." 499 U.S. at 210.

E. The EEOC's Threat-to-Self Regulation is Not Entitled to Deference

For all of these reasons, the EEOC's interpretation of the statutory "qualification standards" language to authorize a threat-to-self defense must be rejected. An agency interpretation of a statute is entitled to deference only where the statute is ambiguous. *Chevron U.S.A., Inc.*

v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Even if the term "qualification standards" could, in the abstract, embrace a requirement that an employee pose no risk to his own health or safety, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). To read the ADA's "qualification standards" provision as incorporating a threat-to-self defense is to ignore several crucial features of the statutory context here: (1) Congress's clear decision, plainly expressed in the text of the "qualified individual" provision, to eliminate the basis on which the EEOC had earlier adopted a no-threat-to-self condition for recovery under the Rehabilitation Act; (2) Congress's clear decision to limit the specific "direct threat" defense to cases involving threats to *others*; (3) the limitation of the statutory "qualification standards" defense to cases that do not involve disparate treatment – a limitation the EEOC itself recognizes elsewhere in its regulations; and (4) the clear statutory command that the "business necessity" issue must be resolved on an employer- and job-specific basis.

"In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as [this Court has] said, is the end of the matter." *Brown* v. *Gardner*, 513 U.S. at 120 (internal quotation marks omitted). Regardless of the level of deference generally accorded to EEOC regulations interpreting the ADA, the threat-to-self regulation incorporates an "impermissible interpretation" of that statute and is not entitled to deference. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

F. Even Under the EEOC's "Threat-to-Self" Regulation, Chevron Has Not Established that Echazabal Would Pose a Direct Threat to His Own Safety

In its brief on the merits (Pet. Br. 40-42), Chevron argues that this Court should affirm the district court's conclusion that Echazabal's continued employment would pose a "direct threat" to his own safety. But Chevron's petition for certiorari presented only the *legal* question "[w]hether a person who is unable to carry out the essential functions of a job without incurring substantial risks to the person's own health or life is a 'qualified individual' who satisfies 'qualification standards' for that job within the meaning of the Americans with Disabilities Act." Pet. i. It did not pose the factbound question – one that divided the parties below but that the court of appeals did not reach – whether the district court correctly determined at summary judgment that Echazabal was such a person. Indeed, Chevron's reply brief in support of its petition (at 1) argued that, precisely because the only question presented was the legal one of whether an employer could exclude an employee based on a significant risk to self, "nothing in the procedural posture of this case requires this Court to accept as true" Echazabal's evidence, presented to overcome summary judgment, that he in fact faced no significant risk. Accordingly, "[t]he question whether petitioner was entitled to summary judgment on the [direct threat] issue" was not " 'fairly included' " within the question presented and is "not properly before" this Court. *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, 122 S. Ct. 681, 694 (2002) (quoting S. Ct. R. 14(1)(a)).

In any event, the district court improperly granted summary judgment to Chevron on the threat-to-self issue. The EEOC regulation on which Chevron relies requires that any "direct threat" determination be made on the basis of "a reasonable medical judgment that relies on the *most current* medical knowledge and/or on the *best available* objective evidence." 29 C.F.R. § 1630.2(r) (emphasis added). This language plainly imposes a duty of inquiry on employers who seek to exclude individuals based on asserted safety risks. It is not enough that the employer believe in good faith that the employee would pose a risk. This Court applied a similar analysis in *Bragdon*, where it held that an individual health care professional "had the duty to assess the risk of infection based on the objective, scientific information available to him *and others in his profession*." 524 U.S. at 649 (emphasis added). Although employers may be able to "consult with individual physicians as objective third-party experts," *id.* at 650, they may not evade their obligation to rely on the "most current medical knowledge" and "best available objective evidence" simply by hiring doctors who lack the training, expertise, or inclination to seek out that knowledge and evidence.

Chevron did not conduct the required inquiry when it excluded Echazabal from its plant. See pp. 5-7, *supra*. First, Chevron failed to examine the objective evidence in its possession regarding the levels of hepatotoxins in the coker unit. Had the company done so, Dr. Fedoruk testified, it would have been forced to conclude that "[t]he potential for exposure to hepatotoxins that could cause liver injury is clinically insignificant and is the same for Mr. Echazabal as it is for others performing similar tasks at the Refinery." J.A. 103. Nor did Dr. McGill, Chevron's

non-board-certified company physician "doing industrial medicine just through self-training" (J.A. 134), examine the medical literature which showed that liver enzyme tests are not a proper measure of liver functioning. J.A. 113-114. Had Dr. McGill done so, Dr. Gitnick testified, he would have been forced to recognize that "[t]here is no medical or scientific evidence which supports the conclusion . . . that Mr. Echazabal's health, and specifically his liver condition, were or would be placed at any appreciable or clinically significant degree of risk" in the plant helper job. J.A. 116.[16]

Contrary to Chevron's argument, Echazabal had no burden to present the Fedoruk and Gitnick declarations to the company before it excluded him from the refinery.[17] It is Chevron's burden to establish, as an affirmative defense, that the company conducted a full inquiry into the most current medical knowledge and the best available objective evidence before it made its decision. The Fedoruk and Gitnick declarations did not point to any new scientific discoveries since Chevron's decision in early 1996. They simply established that Chevron's decision to exclude Echazabal was plainly unreasonable

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[16] The Fedoruk and Gitnick declarations establish that even without any accommodation, Echazabal faced no significant risk. Even if Chevron could overcome those declarations, it would still have to establish that no "reasonable accommodation" (such as medical monitoring or the use of personal protective equipment) could eliminate the risk. 29 C.F.R. § 1630.2(r). This Chevron has not done.

[17] Chevron argues, for the first time in this Court, that the Fedoruk and Gitnick declarations are contradicted by the pronouncements of public health agencies. Pet. Br. 41 n.16. But Chevron is incorrect, as we have explained. See pp. 6-7 n.5, pp. 36-37 n.14, *supra*.

based on medical knowledge and objective evidence available at the time of the exclusion.[18] The district court thus incorrectly refused to consider those declarations and improperly granted summary judgment to Chevron.

III. Echazabal is a Qualified Individual with a Disability

Chevron contends (Pet. Br. 42-50) that, wholly independent of the affirmative "qualification standards" defense set forth in Section 12113, an employee who poses a risk to his own health or safety on the job cannot satisfy the "qualified individual" element of the plaintiff's case under ADA Title I. That argument ignores the statutory definition of "qualified individual with a disability," 42 U.S.C. § 12111(8), and treats the affirmative "qualification standards" defense as entirely superfluous.

Title I defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Two crucial aspects of this statutory text are evident. First, the "qualified individual" inquiry is limited to examination of the plaintiff's ability to perform the actual tasks – "functions" – that incumbent employees perform in the position the

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[18] Although Chevron argues that the Fedoruk and Gitnick declarations are irrelevant because they "were not reasonably available to Chevron when it made its decision" (Pet. Br. 41), the company continues to rely on the testimony of Dr. Tang, who rendered no medical opinion until after Chevron made its exclusion decision. See Pet. Br. 11. And it now cites publications issued by public health agencies in 1997 and 1999. *Id.* at 9 n.5. Chevron cannot have it both ways.

plaintiff seeks. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 472 (10th ed. 1993) ("FUNCTION implies a definite end or purpose that the one in question serves or a particular kind of work it is intended to perform."); see also J.A. 209 ("Job functions are those acts or actions that constitute a part of the performance of the job"). An employer may impose other requirements on applicants for a particular position – involving, for example, "the physical abilities a person [has] to have to be qualified to perform the job," Pet. Br. 45 – but those requirements are not "essential functions" of the job. A "function" of the job is something incumbent employees do at work for their employer, not a characteristic applicants must possess to satisfy the employer that they will be able to perform the work if hired. The latter are quintessential "selection criteria," which an employer must justify under the "job-related and consistent with business necessity" defense afforded by Section 12113(a). See 42 U.S.C. § 12113(a) (referring to "qualification standards, tests, or other selection criteria").[19] If they were considered as part of the "qualified individual" inquiry, on

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[19] Chevron thus places entirely too much weight (Pet. Br. 45) on its written job description. To the extent that the description sets forth the tasks incumbent employees perform, it is relevant to the "qualified individual" inquiry – though only as "evidence of the essential functions of the job," not as something that is presumptively entitled to deference. 42 U.S.C. § 12111(8). To the extent that the job description sets forth physical criteria that Chevron believes are correlated to the ability to perform job tasks, it is relevant only to the "job-related and consistent with business necessity" defense for "qualification standards" and other "selection criteria."

which the plaintiff bears the burden of proof, the affirmative "qualification standards" defense of Section 12113(a) would be rendered entirely irrelevant.

Second, the language of the "qualified" definition is phrased in the present tense. The provision asks whether the plaintiff "can perform" the essential functions. Contrary to Chevron's suggestion that a plaintiff must show that he will continue to be able to perform essential job functions indefinitely into the future (Pet. Br. 44), the plaintiff satisfies his burden under the plain text of the statute by showing that he "can," at the time of the challenged exclusion, perform essential functions (though perhaps only with reasonable accommodation). Cf. *Sutton*, 527 U.S. at 482 ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability.").

The court of appeals was thus correct when it held that "not posing a risk to one's own health or safety cannot in and of itself constitute an essential job function." J.A. 211. Such an absence of risk is not a "function" of the job at all. Cf. *Johnson Controls*, 499 U.S. at 207 (" 'It is word play to say that "the job" at Johnson [Controls] is to make batteries without risk to fetuses in the same way "the job" at Western Air Lines is to fly planes without crashing.' ") (quoting *International Union* v. *Johnson Controls*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)). It is simply a characteristic that employers find desirable in employees. If used as a criterion for selecting employees, it may be defended, if at all, only

under the "job-related and consistent with business necessity" test of Section 12113(a).

Given the statute's focus on whether the plaintiff can currently perform the essential functions of the job, a risk that an employee will become injured on the job in the future could make him un-"qualified" in only two classes of cases. First, if an employee seeks a job in which he will immediately die or suffer serious injury, he "cannot" perform essential job tasks because the imminent death or injury will prevent him from completing those tasks. More realistically, an employee may refuse to perform essential job tasks because they would pose too great a risk to his health or safety. See *Foreman*, 117 F.3d at 809-810; *Patterson*, 2000 WL 366113. In such cases, the plaintiff's refusal to perform essential job functions renders him un-"qualified."[20] But where the plaintiff is currently willing and able to perform essential job functions, and the employer's only concern is that those functions might, at some future point, cause injury that requires the plaintiff to leave his job, the plaintiff has plainly satisfied

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[20] Contrary to the Chamber of Commerce's imaginative argument (Chamber Br. 19-20), such an individual could not first seek a job that poses an irreducible risk to his own health and then turn around and invoke OSHA's work-refusal regulation (29 C.F.R. § 1977.12(b)(2)) to shield himself from adverse consequences for refusing to perform essential functions of that job. As this Court made clear in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 21 (1980), the work-refusal regulation applies only when the employee acts reasonably and in good faith. Where an employer has taken all feasible steps to protect an employee short of excluding him, and the employee is the one who demands to be placed in the environment that presents a risk to himself, the employee's subsequent refusal to work could not reflect a reasonable, good-faith belief that the employer is violating the OSH Act. See pp. 37-38, *supra*.

the statutory burden to show that he "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Such a person, contrary to the Chamber of Commerce's argument, would never say, " 'I can't do [the job] because I would hurt myself if I did.' " Chamber Br. 7-8. Any concern about whether such a person may become unable to work in the future must be addressed pursuant to a neutral qualification standard, which the employer must defend as "job-related and consistent with business necessity."

At the time Chevron rejected him, Echazabal was willing and able to perform the essential functions of the plant helper position. As the court of appeals observed, "Echazabal worked for Irwin at the coker unit, performing work similar to the job for which he applied, long after he was diagnosed with hepatitis. There is no evidence that the health of his liver ever affected his ability to do the job." J.A. 211. The most that Chevron can show, even on the most generous reading of its evidence, is that at some indeterminate point in the future – perhaps years in the future – Echazabal might become seriously ill or die on the job and thus no longer be able to work at his position. See pp. 1-5, *supra*. But that prognostication does not detract from Echazabal's present ability to perform the essential functions of the job. Accordingly, Echazabal established that he is a "qualified individual" under the ADA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX
Relevant Statutory Provisions

42 U.S.C. § 12101:

(a) Findings

The Congress finds that –

• • •

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

• • •

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

• • •

42 U.S.C. § 12111:

As used in this subchapter:

* * *

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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42 U.S.C. § 12112:

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of

such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

* * *

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

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42 U.S.C. § 12113:

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or

tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

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42 U.S.C. § 12201:

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(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.